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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

NGOC LAM CHE, an individual

Plaintiff,

vs.

PHI McKEE, LP, a limited partnership,

Defendants.

Case No.: 5:16-cv-2759

COMPLAINT FOR

**(1) VIOLATION OF THE UNRUH
CIVIL RIGHTS ACT (CALIFORNIA
CIVIL CODE §§ 51, 52);**

**(2) VIOLATIONS OF THE
AMERICANS WITH DISABILITIES
ACT OF 1990**

COMPLAINT

I.
SUMMARY

1
2
3 **1.** This is a civil rights action by Plaintiff Ngoc Lam Che (“Plaintiff”) for discrimination
4 at the building, structure, facility, complex, property, land, development, and/or surrounding
5 business complex known as: 301 N. Jackson Ave., San Jose, California 95133 (the “Property”).
6 Plaintiff frequents the area at least once a week for dining and entertainment.

7 **2.** Plaintiff seeks damages, injunctive and declaratory relief, attorney’s fees and costs
8 pursuant to the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101, et seq.) and related
9 California statutes¹ against Defendant, the tenant and/or owner of the Property, PHI McKEE, LTD
10 (“Defendant”).

II.
JURISDICTION

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12
13 **3.** This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA
14 claims.

15 **4.** Supplemental jurisdiction for claims brought under parallel California law – arising
16 from the same nucleus of operative facts – is predicated on 28 U.S.C § 1367.

17 **5.** Plaintiff’s claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III.

VENUE

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19
20 **6.** All actions complained of herein take place within the jurisdiction of the United
21 States District Court, Central District of California, and venue is invoked pursuant to 28 U.S.C. §
22 1391(b), (c).

IV.

PARTIES

23
24
25 **7.** Defendant is, or was at the time of the incident, the owners, operators, lessors and/or
26 lessees of the Property, and consist of a person (or persons), firm, company, and/or corporation.

27 **8.** Plaintiff is a T-6 paraplegic, and as a result is unable to walk or stand, and thus

28 ¹ Plaintiff is not currently asserting a cause of action under California Civil Code § 55, but may
amend his complaint at a later time upon discovery of facts which give rise to such a claim.

1 requires a use of a wheelchair at all times when traveling in public. Plaintiff is “physically disabled”
 2 as defined by all applicable California and United States laws, and a member of the public whose
 3 rights are protected by these laws.

4 **V.**

5 **FACTS**

6 **9.** In May 5, 2015, Plaintiff attempted to patronize the Property. The Property is a sales
 7 or retail establishment, open to the public, which is intended for nonresidential use and whose
 8 operation affects commerce.

9 **10.** Plaintiff visited the Property and encountered barriers (both physical and intangible)
 10 that interfered with – if not outright denied – Plaintiff’s ability to use and enjoy the goods, services,
 11 privileges and accommodations offered at the facility. To the extent known by Plaintiff, the barriers
 12 at the Property included, but are not limited to the following:

- 13 a. There are no accessible parking spaces at the Property, and/or accessible parking
 14 spaces have missing and/or incorrect warning signage at the parking facilities thus
 15 making it difficult for Plaintiff to determine which spaces are intended for and will
 16 accommodate disabled persons. Without an accessible parking space accompanied
 17 by an access aisle, Plaintiff cannot transfer in and out of his car to his wheelchair.
 18 b. Accessible parking spaces do not have the required tow away signage. In the past
 19 Plaintiff has parked in an accessible parking space only to have a car park illegally in
 20 the access aisle, thus preventing Plaintiff from being able to access his car. Without a
 21 tow away signage, Plaintiff has no means of contacting a tow company to tow away
 22 the car.

23 **11.** These barriers to access are listed without prejudice to Plaintiff citing additional
 24 barriers to access after inspection by Plaintiff’s access consultant, per the 9th Circuit’s standing
 25 standards under *Doran v. 7-Eleven, Inc.* 524 F.3d 1034 (9th Cir. 2008). These barriers prevented
 26 Plaintiff from enjoying full and equal access to the Property.

27 **12.** Plaintiff was deterred from visiting the Property as a result of the accessible barriers
 28 he encountered. He continues to be deterred from visiting the Property because of the future threats

1 of injury created by these barriers. Plaintiff would patronize the Property once the barriers are
2 removed.

3 **13.** Defendant knew that these elements and areas of the Property were inaccessible,
4 violate state and federal law, and interfere with (or deny) access to the physically disabled.
5 Moreover, Defendant has the financial resources to remove these barriers from the Property (without
6 much difficult or expense), and make the Property accessible to the physically disabled. To date,
7 however, the Defendant refuses to remove those barriers.

8 **14.** At all relevant times, Defendant has possessed and enjoyed sufficient control and
9 authority to modify the Property to remove impediments to wheelchair access and to comply with
10 the Americans with Disabilities Act Accessibility Guidelines and Title 24 regulations. Defendant
11 has not removed such impediments and has not modified the Property to conform to accessibility
12 standards.

13 VI.

14 **FIRST CAUSE OF ACTION: VIOLATION OF CALIFORNIA LAW INCLUDING: THE** 15 **UNRUH ACT, CIVIL CODE §§ 51, 52 AND THE AMERICANS WITH DISABILITIES ACT**

16 **AS INCORPORATED BY CIVIL CODE SECTION 51(f)**

17 **15.** Plaintiff incorporates the allegations contained in paragraphs 1 through 14 for this
18 claim and incorporates them herein.

19 **16.** At all times relevant to this complaint, California Civil Code § 51 has provided that
20 physically disabled persons are free and equal citizens of the state, regardless of disability or medical
21 condition:
22

23 All persons within the jurisdiction of this state are free and equal, and no matter
24 what their sex, race, color, religion, ancestry, national origin, disability, or
25 medical condition are entitled to the full and equal accommodations, advantages,
26 facilities, privileges, or services in all business establishments of every kind
27 whatsoever. Cal. Civ. Code § 51(b).

28 **17.** California Civil Code § 52 provides that the discrimination by Defendant against

1 Plaintiff on the basis of his disabilities constitutes a violation of the anti-discrimination provisions of
 2 §§ 51 and 52.

3 **18.** Defendant's discrimination constitutes a separate and distinct violation of California
 4 Civil Code § 52 which provides that:

5 Whoever denies, aids or incites a denial, or makes any discrimination or
 6 distinction contrary to section 51, 51.5 or 51.6 is liable for each and every offense
 7 for the actual damages, and any amount that may be determined by a jury, or a
 8 court sitting without a jury, up to a maximum of three times the amount of actual
 9 damage but in no case less than four thousand dollars (\$4,000) and any attorney's
 10 fees that may be determined by the court in addition thereto, suffered by any
 11 person denied the rights provided in Section 51, 51.5 or 51.6.

12 **19.** Any violation of the Americans with Disabilities Act of 1990 (as pled in the Second
 13 Cause of Action) constitutes a violation of California Civil Code § 51(f) thus independently
 14 justifying an award of damages and injunctive relief pursuant to California law. Per § 51(f), "[a]
 15 violation of the right of any individual under the Americans with Disabilities Act of 1990 ... shall
 16 also constitute a violation of this section."

17 **20.** The actions and omissions of Defendant as herein alleged constitute a denial of access
 18 to and use of the described public facilities by physically disabled persons within the meaning of
 19 California Civil Code §§ 51 and 52. As a proximate result of Defendant's action and omissions
 20 Defendant has discriminated against Plaintiff in a violation of Civil Code §§ 51 and 51.
 21

22 VII.

23 **SECOND CAUSE OF ACTION: VIOLATION OF THE AMERICANS WITH** 24 **DISABILITIES ACT OF 1990 (42 USC §§ 12101 *et seq.*)**

25 **21.** Plaintiff incorporates the allegations contained in paragraphs 1 through 20 for this
 26 claim and incorporates them herein.

27 **22.** As part of the Americans with Disabilities Act of 1990 ("ADA"), Congress passed
 28 "Title III – Public Accommodations and Services Operated by Private Entities." 42 U.S.C. § 12181

1 et seq. The Property is one of the “private entities” which are considered “public accommodations”
2 for purposes of this title, which includes any “restaurant, bar, or other sales or rental establishment
3 serving food or drink.” § 301(7)(B).

4 **23.** The ADA states that “[n]o individual shall be discriminated against on the basis of
5 disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or
6 accommodations of any place of public accommodation by any person who owns, leases, or leases
7 to, or operates a place of public accommodation.” 42 U.S.C. § 12182.

8 **24.** The acts and omissions of Defendant set forth herein were in violation of Plaintiff’s
9 rights under the ADA and the regulations promulgated thereunder, 28 CFR Part 36 *et seq.*

10 **25.** The removal of each of the barriers complained of by Plaintiff as hereinabove alleged,
11 were at all times herein mentioned "readily achievable" under the standards §§ 301 and 302 of the
12 ADA. As noted hereinabove, removal of each and every one of the architectural barriers complained
13 of herein were also required under California law. Further, on information and belief, alterations,
14 structural repairs or additions since January 26, 1993 have also independently triggered requirements
15 for removal of barriers to access for disabled persons per § 303 of the ADA. In the event that
16 removal of any barrier is found to be "not readily achievable," Defendant still violated the ADA,
17 per § 302(b)(2)(A)(v) by failing to provide all goods, services, privileges, advantages and
18 accommodations through alternative methods that were readily achievable.

19 **26.** On information and belief, as of the date of Plaintiff’s encounter at the Property and
20 as of the filing of this Complaint, the Defendant has denied and continues to deny full and equal
21 access to Plaintiff and to other disabled persons, including wheelchair users, in other respects, which
22 violate Plaintiff’s rights to full and equal access and which discriminate against Plaintiff on the basis
23 of his disability, thus wrongfully denying to Plaintiff the full and equal enjoyment of the goods,
24 services, facilities, privileges, advantages and accommodations, in violation of §§ 302 and 303 of the
25 ADA. 42 USC §§ 12182 and 12183.

26 **27.** On information and belief, Defendant has continued to violate the law and deny the
27 rights of Plaintiff and other disabled persons to access this public accommodation since on or before
28 Plaintiff’s encounters, as previously noted. Pursuant to the ADA, § 308, 42 USC 12188 *et seq.*,

1 Plaintiff is entitled to the remedies and procedures set forth in § 204(a) of the Civil Rights Act of
 2 1964, 42 USC 2000(a)-3(a), as Plaintiff is being subjected to discrimination on the basis of disability
 3 in violation of the ADA or has reasonable grounds for believing that he is about to be subjected to
 4 discrimination. Pursuant to § 308(a)(2), "In cases of violations of § 302(b)(2)(A)(iv) and § 303(a) ...
 5 injunctive relief shall include an order to alter facilities to make such facilities readily accessible to
 6 and usable by individuals with disabilities to the extent required by this title."

7 **28.** Plaintiff seeks relief pursuant to remedies set forth in § 204(a) of the Civil Rights Act
 8 of 1964, 42 USC 2000(a)-3(a), and pursuant to Federal Regulations adopted to implement the
 9 Americans with Disabilities Act of 1990. Plaintiff is a qualified disabled person for purposes of §
 10 308(a) of the ADA who is being subjected to discrimination on the basis of disability in violation of
 11 Title III and who has reasonable grounds for believing he will be subjected to such discrimination
 12 each time that he may attempt to use the Property and premises.

13 **PRAYER**

14 WHEREFORE, Plaintiff prays that this court award damages and provide relief as follows:

15 1. Issue a preliminary and permanent injunction directing Defendant as current owners,
 16 operators, lessors, and/or lessees of the Property and premises to modify the above described
 17 Property and premises and related facilities so that each provides full and equal access to all persons,
 18 including but not limited to persons with physical disabilities who use wheelchairs, and issue a
 19 preliminary and permanent injunction directing Defendant to provide and maintain facilities usable
 20 by Plaintiff and similarly situated persons with disabilities, and which provide full and equal access,
 21 as required by law, including appropriate changes in policy;

22 2. Retain jurisdiction over the Defendant until such time as the Court is satisfied that
 23 Defendant's unlawful policies, practices, acts and omissions, and maintenance of inaccessible public
 24 facilities as complained of herein no longer occur, and can not recur;

25 3. Award to Plaintiff all appropriate damages, including but not limited to statutory damages,
 26 general damages and treble damages in amounts within the jurisdiction of this Court, all according to
 27 proof;
 28

4. Award to Plaintiff all reasonable statutory attorney fees, litigation expenses, and costs of this proceeding as provided by law;
5. Award to Plaintiff prejudgment interest pursuant to California Civil 17 Code§ 3291;
6. Grant such other and further relief as this Court may deem just and proper.

ASCENSION LAW GROUP, PC

DATE: May 21, 2016

 /s/ Pamela Tsao

Pamela Tsao, attorney for Plaintiff

Ngoc Lam Che

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury for all claims for which a jury is permitted.

ASCENSION LAW GROUP, PC

DATE: May 21, 2016

_____/s/ Pamela Tsao

Pamela Tsao, attorney for Plaintiff

Ngoc Lam Che